

Michael J. Malecek (State Bar No. 171034)
 Email address: michael.malecek@kayescholer.com
 Peter E. Root (State Bar No. 142348)
 Email address: peter.root@kayescholer.com
 Stephen Holmes (State Bar No. 200727)
 Email address: stephen.holmes@kayescholer.com
KAYE SCHOLER LLP
 Two Palo Square, Suite 400
 3000 El Camino Real
 Palo Alto, California 94306
 Telephone: (650) 319-4500
 Facsimile: (650) 319-4700

Attorneys for Defendant and
 Counterclaim-Plaintiff Sequenom, Inc.

**UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

ARIA DIAGNOSTICS, INC.,

Plaintiff,

v.

SEQUENOM, INC.,

Defendant/
 Counterclaim-Plaintiff,

v.

ARIA DIAGNOSTICS, INC.,

Counterclaim-Defendant,

and

ISIS INNOVATION LIMITED,

Nominal Counterclaim-
 Defendant.

Case No. 3:11-cv-06391-SI

**DECLARATION OF PETER ROOT IN
 SUPPORT OF SEQUENOM'S
 MOTION FOR PRELIMINARY
 INJUNCTION**

Date: June 22, 2012
 Time: 9:00 a.m.
 Place: Courtroom 10, 19th Floor
 Judge: Hon. Susan Illston

1 I, Peter Root, declare:

2 1. I am an attorney admitted to practice law in the State of California. I am a partner
3 in the law firm of Kaye Scholer LLP and counsel for Sequenom, Inc. ("Sequenom"), the
4 defendant and counterclaim-plaintiff in the above-captioned action. I have personal knowledge of
5 the facts stated in this declaration, and if called as a witness I could and would testify competently
6 thereto. This declaration is made in support of Sequenom's Reply in support of Sequenom's
7 Motion For Preliminary Injunction filed concurrently herewith.

8 2. Attached to this declaration are excerpts of depositions taken by counsel for
9 Sequenom of Drs. Stuelpnagel, Sullivan, Bischoff, and Fearon, each of whom submitted
10 declarations accompanying Ariosa's opposition to Sequenom's motion for preliminary injunction,
11 as well as certain exhibits to the depositions, and excerpts of the deposition taken by counsel for
12 Sequenom of Ariosa's Chief Scientific Officer, Dr. Oliphant, as detailed below. In the exhibits
13 enumerated below, particular text to which we respectfully direct the Court's attention is enclosed
14 in brackets.

15 3. Attached as Exhibit 1 to this declaration is a true and correct copy of the cover
16 page and selected pages of the deposition of Dr. John Stuelpnagel taken in the above-captioned
17 action on May 23, 2012: Stuelpnagel Dep. at 50:18-21; 51:2-6; 62:4-15; 74:19-22; 24-25; 75:4-9;
18 93:16-22; 100:25-101:5; 101:24-102:2; 105:19-25; 106: 2-9; 107:2-3; 138:12-20; 168:11-15;
19 169:11-14; 176:18-177:9; 177:17-178:12; 181:15-18; 182:9-11; 193:12-18; 194:11-14; 214:8-15;
20 and 243:15-23. Ariosa has designated this transcript as "HIGHLY CONFIDENTIAL --
21 OUTSIDE ATTORNEYS' EYES ONLY" under the Stipulated Protective Order. **[FILED**
22 **UNDER SEAL]**

23 4. Attached as Exhibit 2 to this declaration is a true and correct copy of the cover
24 page and selected excerpts of the deposition of Dr. Arnold Oliphant, Ariosa's Chief Scientific
25 Officer taken in the above-captioned action on May 25, 2012: Oliphant Dep. at 31:18-22; 35:22-
26 36:10; 41:23-43:5; 42:8-20; 73:12-75:3; 76:20-77:23; 79:2-7; 81:3-11; 83:11-24; 187:2-25;
27 221:24-222:6; and 265:8-10. Ariosa has designated this transcript as "HIGHLY
28

CONFIDENTIAL -- OUTSIDE ATTORNEYS' EYES ONLY" under the Stipulated Protective Order. **[FILED UNDER SEAL]**

5. Attached as Exhibit 3 to this declaration is a true and correct copy of the cover page and selected excerpts of the deposition of Dr. Farideh Bischoff, Ariosa's designated non-infringement expert, taken in the above-captioned action on May 24, 2012: Bischoff Dep. at 32:17-22; 35:16-20; 36:3-10; 46:22-47:23; 47:25-48:24; 69:19-23; 77:8-14; 107:3-108:12; 116:3-14; 123:16-21; 140:2-13; 142:20-25; 143:22-144:4; 145:2-19; 146:9-18; 150:25-151:3; 151:11-22; 151:25-152:23; 156:18-157:6; 158:18-159:3; 178:2-179:21, and 179:25-180:19.

6. Attached as Exhibit 4 to this declaration is a true and correct copy of Exhibit 52 to the Deposition of Dr. Farideh Bischoff: Excerpt from the Concise Dictionary of Modern Medicine.

7. Attached as Exhibit 5 to this declaration is a true and correct copy of Exhibit 53 to the Deposition of Dr. Farideh Bischoff: Dorland's Pocket Medical Dictionary, 28th Edition.

8. Attached as Exhibit 6 to this declaration is a true and correct copy of Exhibit 54 to the Deposition of Dr. Farideh Bischoff: U.S. Patent Application 2012/0058480 published March 8, 2012.

9. Attached as Exhibit 7 to this declaration is a true and correct copy of the cover page and selected excerpts of the deposition of Deposition of Dr. Eric R. Fearon, taken in the above-captioned action on May 22, 2012: Fearon Dep. at 11:16-19; 16:10-12; 17:8-14; 17:15-16; 19:18-25; 21:18-22; 17:17-20; 17:21-24; 17:25-18:5; 18:6-10; 20:2-7; 90:3-91:10; 112:15-23; 134:3-5; 138:18-139:2; 174:20-175:6; 225:11-19; 225:20-21; and 225:23-226:10.

10. Attached as Exhibit 8 to this declaration is a true and correct copy of Exhibit 60 to the Deposition of Dr. Arnold Oliphant: Manuscript Accepted on January 23, 2012 in the American Journal of Obstetrics and Gynecology and entitled: Non-invasive Prenatal Detection and Selective Analysis of Cell-free DNA Obtained from Maternal Blood: Evaluation of Trisomy 21 and Trisomy 18.

11. Attached as Exhibit 9 to this declaration is a true and correct copy of U.S. Patent 6,258,540 - Page 6; Column 2; Lines 6 through 10.

12. Attached as Exhibit 10 to this declaration is a true and correct copy of Exhibit 57 to the Deposition of Dr. Farideh Bischoff: February 5, 2003 Article in Reproductive BioMedicine Online entitled: Detecting fetal DNA from dried maternal blood spots: another step towards broad scale non-invasive prenatal genetic screening and feasible testing.

13. Attached as Exhibit 11 to this declaration is a true and correct copy of Exhibit 56 to the Deposition of Dr. Farideh Bischoff: Article in European Society of Human Reproduction and Embryology entitled: Cell-free fetal DNA and intact fetal cells in maternal blood circulation: implications for first and second trimester non-invasive prenatal diagnosis.

14. Attached as Exhibit 12 to this declaration is a true and correct copy of Exhibit 58 to the Deposition of Dr. Farideh Bischoff: Article in the American Association for Clinical Chemistry entitled: Interlaboratory Comparison of Fetal Male DNA Detection from Common Maternal Plasma Samples by Real-Time PCR.

15. Attached as Exhibit 13 to this declaration is a true and correct copy of the cover page and selected excerpts of the deposition of Dr. Ryan Sullivan, taken in the above-captioned action on May 18, 2012: Sullivan Dep. at 71:17-72:3; 96:2-14; 99:25-100-24; 100:3-9; 108:11-109:2; and 186:23-187:6. Ariosa has designated this transcript as “HIGHLY CONFIDENTIAL -- OUTSIDE ATTORNEYS’ EYES ONLY” under the Stipulated Protective Order. **[FILED UNDER SEAL]**

16. Attached as Exhibit 14 to this declaration is a true and correct copy of Exhibit 32 to the Deposition of John Stuelpnagel: February 11, 2012 e-mail from Ken Song to Michael Minahan, Kellie Watson, and John Stuelpnagel. Ariosa has designated this document as “HIGHLY CONFIDENTIAL -- OUTSIDE ATTORNEYS’ EYES ONLY” under the Stipulated Protective Order. **[FILED UNDER SEAL]**

17. Attached as Exhibit 15 to this declaration is a true and correct copy of Exhibit 37 to the Deposition of John Stuelpnagel: Tandem Diagnostics October 18, 2011 Venrock Diligence Session at pages 18-19. Ariosa has designated this document as “HIGHLY CONFIDENTIAL -- OUTSIDE ATTORNEYS’ EYES ONLY” under the Stipulated Protective Order. **[FILED UNDER SEAL]**

1 18. Attached as Exhibit 16 to this declaration is a true and correct copy of the cover
 2 page and selected excerpts of Exhibit 33 to the Stuelpnagel Deposition: Tandem Diagnostics
 3 October 2011 Investor Presentation at pages 29, 30, and 45. Ariosa has designated this document
 4 as “HIGHLY CONFIDENTIAL -- OUTSIDE ATTORNEYS’ EYES ONLY” under the
 5 Stipulated Protective Order. **[FILED UNDER SEAL]**

6 19. Attached as Exhibit 17 to this declaration is a true and correct copy of Exhibit 35
 7 to the Stuelpnagel Deposition: May 19, 2011 e-mail from Bryan Roberts to Ken Song and John
 8 Stuelpnagel. Ariosa has designated this document as “HIGHLY CONFIDENTIAL -- OUTSIDE
 9 ATTORNEYS’ EYES ONLY” under the Stipulated Protective Order. **[FILED UNDER SEAL]**

10 20. Attached as Exhibit 18 to this declaration is a true and correct copy of Exhibit 36
 11 to the Deposition of John Stuelpnagel: October 17, 2011 e-mail from Todd Whitson to “All
 12 Tandem.” Ariosa has designated this document as “HIGHLY CONFIDENTIAL -- OUTSIDE
 13 ATTORNEYS’ EYES ONLY” under the Stipulated Protective Order. **[FILED UNDER SEAL]**

14 21. Attached as Exhibit 19 to this declaration is a true and correct copy of Exhibit 23
 15 to the Deposition of John Stuelpnagel: February 29, 2012 e-mail from Jennifer Bruursema to Ken
 16 Song, Stacey Schack, Todd Whitson, and John Stuelpnagel with attachment (Harmony Prenatal
 17 Test, 2012 Marketing Plan for USA Launch). Ariosa has designated this document as “HIGHLY
 18 CONFIDENTIAL -- OUTSIDE ATTORNEYS’ EYES ONLY” under the Stipulated Protective
 19 Order. **[FILED UNDER SEAL]**

20 22. Attached as Exhibit 20 to this declaration is a true and correct copy of Exhibit 8 to
 21 the Sullivan Deposition. This Exhibit 8 is selected portions of testimony given by Dr. Sullivan in
 22 a previous case in which he testified as an economics expert. *See* Trial Tr. at 107:17-108:2.

23 23. Attached as Exhibit 21 to this declaration is a true and correct copy of the cover
 24 page and selected excerpts of Exhibit 28 to the Stuelpnagel Deposition: Positioning Workshop:
 25 Executive Summary. Ariosa has designated this document as “HIGHLY CONFIDENTIAL --
 26 OUTSIDE ATTORNEYS’ EYES ONLY” under the Stipulated Protective Order. **[FILED**
 27 **UNDER SEAL]**

24. Attached as Exhibit 22 to this declaration is a true and correct copy of Exhibit 40 to the Stuelpnagel Deposition: correspondence from Food and Drug Administration to Ariosa (then Tandem Diagnostics, Inc.). Ariosa has designated this document as “HIGHLY CONFIDENTIAL -- OUTSIDE ATTORNEYS’ EYES ONLY” under the Stipulated Protective Order. **[FILED UNDER SEAL]**

25. On May 16, 2012, I sent an email to Michael Ermer, counsel for Ariosa, requesting production of Ariosa’s agreement with LabCorp in time for the May 18 Sullivan Deposition. A true and correct copy of that email is attached to this declaration as Exhibit 23. Counsel for Ariosa did not respond to the request. I again asked for a copy of the Ariosa-LabCorp agreement during the May 18 Sullivan deposition; counsel for Ariosa refused to produce the agreement on the grounds that Dr. Sullivan had not reviewed the agreement and had not relied on it for purposes of his analysis. *See* Exhibit 13 hereto (Sullivan Dep.) at 99:25-100-24.

26. On May 22, 2012, I sent an email to counsel for Ariosa once again requesting a copy of the Ariosa-LabCorp agreement. A true and correct copy of that email is attached to this declaration as Exhibit 24. This document contains information that Ariosa has designated as “HIGHLY CONFIDENTIAL -- OUTSIDE ATTORNEYS’ EYES ONLY” under the Stipulated Protective Order. **[FILED UNDER SEAL]**. Ariosa’s counsel produced the Ariosa-LabCorp agreement on May 23, 2012, during the Stuelpnagel Deposition.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on June 5, 2012 in Palo Alto, California.

/s/ Peter Root

Peter Root